No. 90-1591 (2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

IN RE: ELIZABETH HAYES LUCAS, *Debtor*
JANE B. FORBES, TRUSTEE,
Petitioner,

vs.

HOLIDAY CORPORATION SAVINGS AND
RETIREMENT PLAN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a debtor's interest in an ERISA qualified pension plan containing a prohibition against assignment or alienation excluded from property of the bankruptcy estate under 11 U.S.C. § 541(c)(2)?

2. Petitioner's second question presented for review is not properly before this Court. The Bankruptcy Court recognized that exemption of pension benefits under 11 U.S.C. § 522(b)(2)(A) (1986) or the Tennessee exemption statute set forth in Tenn. Code Ann. §§ 26-2-112, 26-2-104 and 26-2-111(1)(D) were either not claimed by the Debtor or not contested by the Petitioner or Respondent. Forbes v. Lucas (In re Lucas), 100 B.R. 969, 970 n.2 (Bankr. M.D. Tenn. 1989); Petitioner's Appendix at pp. 21a and 30a.

LIST OF PARTIES

As a supplement to the List of Parties contained in the Petition for Writ of Certiorari, Respondent shows that Holiday Inns, Inc. is the sponsor of the Holiday Inns, Inc. Savings and Retirement Plan, an ERISA qualified savings and retirement plan, formerly known as the Holiday Corporation Savings and Retirement Plan. Although Holiday Inns, Inc. is not publicly owned, it is owned through a series of intermediate non-public corporations, by Bass plc, which is publicly owned. [1/]

1/ Pursuant to Rule 29.1 of this Court, Respondent states that the following constitutes a list of its parent company and non-wholly owned subsidiaries: Bass plc; Holiday Inns, Inc.; Priscilla Holiday of Texas, Inc.; Priscilla Pacific, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS. iii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE WRIT 4

I. THE SIXTH CIRCUIT'S DECISION IS FAIR AND CORRECT 4

II. THE QUESTION PRESENTED IS PREMATURE FOR DECISION 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Anderson v. Raine (In re Moore), 907 F.2d 1476 (4th Cir. 1990) 4, 5, 6, 8

Brotherhood of Locomotive Firemen v. Bangor & A. R.R., 389 U.S. 327 (1967) 1

Connally v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) 6

Daniel v. Security Pac. Nat'l Bank (In re Daniel), 771 F.2d 1352 (9th Cir. 1985), cert. denied, 475 U.S. 1016 (1986) 5, 8

Forbes v. Lucas (In re Lucas), 100 B.R. 969 (Bankr. M.D. Tenn. 1989) i

Forbes v. Lucas (In re Lucas), 924 F.2d 597 (6th Cir. 1991) 1, 2

Fox Valley & Vincinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir.), cert. denied, 111 S. Ct. 67 (1990) 5

Goff v. Taylor (In re Goff), 706 F.2d 574 (5th Cir. 1983) 5, 8

Grogan v. Garner, 111 S. Ct. 654 (1991) 6

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 110 S. Ct. 680 (1990) 6, 8

Herberger v. Shanbaum, 897 F.2d 801 (5th Cir.), cert. denied, 111 S. Ct. 60 (1990) 8

Judson v. Witlin (In re Witlin),
640 F.2d 661 (5th Cir. Unit B 1981) 5

In re Kincaid, 917 F.2d 1162 (9th Cir. 1990) 8

Lichstrahl v. Bankers Trust (In re Lichstrahl),
750 F.2d 1488 (11th Cir. 1985) 5

Mackey v. Lanier Collections Agency & Serv.,
Inc., 486 U.S. 825 (1988) 6, 8

In re Majul,
119 B.R. 118 (Bankr. W.D. Tex. 1990) 6, 8

Mason v. Eastman Kodak Co. (In re Parker),
473 F. Supp. 746 (W.D.N.Y. 1979) 5

Pennsylvania Dep't of Pub. Welfare v.
Davenport, 110 S. Ct. 2126 (1990) 6

In re Rosenquist,
122 B.R. 775 (Bankr. M.D. Fla. 1990) 8

Samore v. Graham (In re Graham),
726 F.2d 1268 (8th Cir. 1984) 5

Turpin v. Wente (In re Turpin),
644 F.2d 472 (5th Cir. Unit A 1981) 5

United States v. Ron Pair Enters., Inc.,
489 U.S. 235 (1988) 4, 7

STATUTES

11 U.S.C. § 108(a) 4

11 U.S.C. § 109(c)(2) 4

11 U.S.C. § 362(b)(12) 4

11 U.S.C. § 522(b)(1) 4

11 U.S.C. § 522(b)(2) . . . . . i, 4

11 U.S.C. § 523(a)(5) 4

11 U.S.C. § 541(c)(2) . . . . . i, 2, 4, 7, 8

11 U.S.C. § 903(1) 4

11 U.S.C. § 1125(d) 4

11 U.S.C. § 1145(a) 4

26 U.S.C. § 401(a)(13) 6

29 U.S.C. § 501(b) 8

29 U.S.C. § 1056(d)(1) 1, 5, 6

Tenn. Code Ann. § 26-2-104 i

Tenn. Code Ann. § 26-2-111(1)(D) i

Tenn. Code Ann. § 26-2-112 i

Former 11 U.S.C. § 110 5

The Retirement Equity Act, Pub. L. No. 98-397
98 Stat. 1426 (1984) 3, 5

OTHER

S. Rep No. 575, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 2547 . . . . . 5, 7

S. Rep. No. 989, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 5787. 4

H.R. Rep. No. 595, 95th Cong., 2d Sess. (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5963 4

Treas. Reg. § 1.403(a)-13(b)(1) 6

JURISDICTION

The United States Court of Appeals for the Sixth Circuit reversed and remanded the instant case to the district court and/or the bankruptcy court to make findings as to whether the Holiday Inns, Inc. Savings and Retirement Plan ("Holiday Plan") constitutes a pension plan within the meaning of 29 U.S.C. § 1056(d)(1). Forbes v. Lucas (In re Lucas), 924 F.2d 597, 602 (6th Cir. 1991); Petitioner's Appendix at p. 13a. Section 1056(d)(1) reads: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Petitioner's Appendix at p. 34a. The question presented is not ripe for review because the Sixth Circuit remanded for a determination of the very issue which is central to consideration of the question. Brotherhood of Locomotive Firemen v. Bangor & A. R.R., 389 U.S. 327, 328 (1967). Based on the evidence in the record on appeal to the Sixth Circuit, Respondent has requested that Petitioner stipulate that the Holiday Plan is an ERISA qualified pension plan containing an anti-alienation provision. Petitioner has not agreed to Respondent's request as of the date of submission of this Brief in Opposition and therefore, because of the remand by the Sixth Circuit, the question presented is not ripe for review.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION IS FAIR AND CORRECT

Section 541(c)(2) of the Bankruptcy Code, codified as 11 U.S.C. § 541(c)(2), explicitly excepts from property of the bankruptcy estate "a beneficial interest of the debtor in a trust that is enforceable under **applicable nonbankruptcy law.**" (Emphasis added) The Sixth Circuit correctly held that the plain meaning of the statutory phrase "applicable nonbankruptcy law" included both state and federal law. And, given the clear and unambiguous language of the statute, resort to legislative history was unnecessary to interpret or apply the statute. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1988). In so holding, the court recognized that Congress had differentiated between "State law," 11 U.S.C. §§ 109(c)(2), 362(b)(12), 522(b)(1) and (2), 523(a)(5), 903(1), 1145(a), and "applicable nonbankruptcy law," 11 U.S.C. §§ 108(a), 1125(d), in numerous sections of the Bankruptcy Code. See also Anderson v. Raine (In re Moore), 907 F.2d 1476 (4th Cir. 1990).

The Sixth Circuit correctly rejected a restrictive and overly narrow construction of Section 541(c)(2) based on a proffered reading of the legislative history that would limit the interpretation of "applicable nonbankruptcy law" to state spendthrift trust law. The statute is not ambiguous and therefore resort to legislative history is not necessary to discern the meaning of the phrase applicable nonbankruptcy law. Furthermore, the reference to spendthrift trust law in the legislative history favors the plain meaning or is at least inconclusive. See In re Moore, 907 F.2d at 1479. The House Report states that the statute "preserves restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law." See H.R. Rep. No. 595, 95th Cong., 2d Sess. 369 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 6325. The Report later adds that Section 541(c)(2) "continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable state law." Id. at 176, 1978 U.S. Code Cong. & Admin. News at 6136. The Senate Report states that Section 541(c)(2) "preserves restrictions on a transfer of a spendthrift trust ...." S. Rep. No. 989, 95th Cong., 2d Sess. 83, reprinted in 1978 U.S.

Code Cong. & Admin. News 5787, 5869. The legislative history of the 1984 amendments to ERISA, the Retirement Equity Act, Pub. L. No. 98-397, 98 Stat. 1426 (1984), acknowledges that the prohibitions against assignment or alienation contained in 29 U.S.C. § 1056(d)(1) are "spendthrift provisions." S. Rep. No. 575, 98th Cong., 2d Sess. 18-19, reprinted in 1984 U.S. Code Cong. & Admin. News 2564-65. When interpreted against the backdrop of the unambiguous statutory language, use of the word "spendthrift" in the legislative history is a generic use and is not limited to spendthrift trusts that are recognized under state law. Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 278 (7th Cir.), cert. denied, 111 S.Ct. 67 (1990).

The Sixth Circuit's ruling is also consistent with pre-Bankruptcy Code law which recognized that spendthrift provisions in employer created pension plans prevented the benefits from passing to the bankruptcy trustee under Section 70a(5) of the Bankruptcy Act of 1898, as amended. Former 11 U.S.C. § 110, See, e.g., Turpin v. Wente (In re Turpin), 644 F.2d 472 (5th Cir. Unit A 1981); Mason v. Eastman Kodak Co. (In re Parker), 473 F. Supp. 746 (W.D.N.Y. 1979). However, similar provisions in self-settled plans were not effective in preventing the benefits from passing to the trustee. See, e.g., Judson v. Witlin (In re Witlin), 640 F.2d 661 (5th Cir. Unit B 1981). This distinction was explicitly recognized by the first appellate court to consider the issue under the Bankruptcy Code. Goff v. Taylor (In re Goff), 706 F.2d 574, 589 (5th Cir. 1983) (benefits under self-settled Keogh plans are property of the bankruptcy estate). All other circuit court decisions cited by Petitioner for the proposition that pension benefits are property of the bankruptcy estate also involved self-settled plans. See Samore v. Graham (In re Graham), 726 F.2d 1268 (8th Cir. 1984); Daniel v. Security Pac. Nat'l Bank (In re Daniel), 771 F.2d 1352 (9th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); Lichstrahl v. Bankers Trust (In re Lichstrahl), 750 F.2d 1488 (11th Cir. 1985). However, the plan in this case and the plan addressed by the Fourth Circuit in Anderson v. Raine (In re Moore), 907 F.2d 1476, both involved employer sponsored plans and both courts concluded that the benefits were not property of the bankruptcy estate. See also discussion at Part II below.

The decision of the Sixth Circuit is also fair and correct because it gives effect to and harmonizes the language and policy of coordinate federal statutes. Specifically, the Sixth Circuit's decision

Mackey v. Lanier Collections Agency & Service, 486 U.S. 825 (1988) and Guidry v. Sheet Metal Workers National Pension Fund, 110 S. Ct. 680 (1990). These decisions recognize the importance of ERISA's spendthrift provisions in safeguarding an employee's retirement income from the reach of creditors. In Guidry v. Sheet Metal Workers National Pension Fund, this Court strictly applied those anti-alienation and anti-assignment provisions to preclude the imposition of a constructive trust on pension benefits under the applicable provision of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501(b) ("LMRDA"). Among other things, this Court recognized that ERISA, as a specific statute, will not be controlled or nullified by a general statute such as the LMRDA. This analysis is equally applicable to the Bankruptcy Code.

Consistent with the foregoing, the Bankruptcy Court for the Western District of Texas in In re Majul, 119 B.R. 118 (Bankr. W.D. Tex. 1990) did not follow Goff v. Taylor (In re Goff), 706 F.2d 574 (5th Cir. 1983) and instead agreed with the reasoning of Anderson v. Raine (In re Moore), 907 F.2d 1476 (4th Cir. 1990). In so holding, the Majul Court observed, "It also seems incongruous that an imprisoned embezzler in Guidry received protection of his pension plan benefits, while an innocent, but insolvent, debtor in bankruptcy would not receive the ERISA anti-alienation protection. Surely Congress did not intend, and the United States Supreme Court would not permit such inconsistent results in light of ERISA's policy objectives." 119 B.R. at 123 n.5. See also In re Kincaid, 917 F.2d 1162, 1169 (9th Cir. 1990) in which the earlier Ninth Circuit decision of Daniel v. Security Pacific National Bank (In re Daniel), 771 F.2d 1352 (9th Cir. 1985) cert. denied, 475 U.S. 1016 (1986) was questioned in a concurring opinion and Herberger v. Shanbaum, 897 F.2d 801, 803 (5th Cir.), cert. denied, 111 S. Ct. 60 (1990) in which the Fifth Circuit recognized the significance of Guidry in a non-bankruptcy case. But see In re Rosenquist, 122 B.R. 775, 780-782 (Bankr. M.D. Fla. 1990).

In summary, the question presented is premature for decision. First, this case is not an appropriate one for review of the application of 11 U.S.C. § 541(c)(2) to self-settled pension plans because it involves an employer sponsored plan and any ruling respecting self-settled pension plans could be construed as dicta. Second, it is respectfully submitted that as the issue arises the circuit courts will review their decisions that rely on legislative history in light of the 1984 amendments to ERISA, the legislative history addressing these

amendments, and the recent decisions of this Court in Mackey and Guidry, and correct those decisions where necessary. Thus, the law will evolve naturally without the need for this Court to intervene.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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STATEMENT OF THE CASE

Elizabeth Hayes Lucas, prior to her death, was employed by Holiday Inns, Inc. as a waitress at a Holiday Inns hotel. She was also a participant in the Holiday Inns, Inc. Savings and Retirement Plan ("the Holiday Plan"). Ms. Lucas contributed to the Holiday Plan on a tax deferred basis by having funds withheld from her paycheck and Holiday Inns, Inc. matched these contributions up to six percent of Ms. Lucas' income. On December 22, 1986, Ms. Lucas filed a voluntary petition under Chapter 7 of the Bankruptcy Code, Title 11, United States Code. Ms. Lucas claimed a bankruptcy exemption of $2,000 against her beneficial interest of $5,863.08 in the Holiday Plan. On April 6, 1987 Petitioner requested that Respondent provide an accounting of Ms. Lucas' Benefits under the Holiday Plan. One year later on April 9, 1988, after discussions between the Petitioner and Ms. Lucas to which the Respondent was not a party, the Petitioner filed a complaint against Ms. Lucas and the Respondent seeking turnover of the $3,863.08 balance in her retirement account. During the year between Petitioner's initial inquiry and the filing of the Complaint, Ms. Lucas had requested and obtained from the Holiday Plan a hardship distribution in connection with medical bills that she had incurred. The Holiday Plan opposed the turnover complaint on the ground, among others, that the pension benefits were not property of the bankruptcy estate under 11 U.S.C. § 541(c)(2).

SUMMARY OF ARGUMENT

The Sixth Circuit's ruling in Forbes v. Lucas (In re Lucas), 924 F.2d 597 (6th Cir. 1991) is fair and correct. The Court held that the plain meaning of the phrase "applicable nonbankruptcy law" contained in 11 U.S.C. § 541(c)(2) includes ERISA federal law. The Sixth Circuit, therefore, correctly concluded that the prohibition against assignment or alienation of pension benefits under the Holiday Plan was effective to prevent Ms. Lucas' pension benefits from becoming property of her bankruptcy estate. This holding is in accord with the legislative history and is consistent with pre-Bankruptcy Code law which gave full recognition to spendthrift provisions in employer created pension plans but did not enforce those provisions in bank-

ruptcy for self-settled pension plans. At the circuit level the cases decided under the Bankruptcy Code have continued this pre-Code distinction.

The Sixth Circuit's decision is also correct because it gives effect to and harmonizes the language and policy of three related federal laws. The fresh start policy of the Bankruptcy Code is furthered by ensuring that pension benefits will be available to the unfortunate but honest debtor. The policy of ERISA to ensure that employees and their dependents receive anticipated retirement benefits is effectuated, and the policy of the Internal Revenue Code to provide favorable tax treatment for qualified pension plans is not disrupted through the disqualification of an entire pension plan due to the bankruptcy filing of a single employee covered by the plan. The Sixth Circuit's ruling also discourages the use of involuntary bankruptcy filings to accomplish indirectly what cannot be accomplished directly by creditors seeking to circumvent ERISA's spendthrift provisions.

Finally, the question presented in this case is premature for review. The circuit cases on which Petitioner relies all addressed ERISA as it existed prior to 1984. In 1984 ERISA was amended with the passage of the "Retirement Equity Act" and its legislative history was supplemented to specifically acknowledge that the anti-alienation prohibitions of ERISA constituted "spendthrift provisions." The circuit cases relied on by the Petitioner were decided before recent and significant decisions of this Court addressing ERISA. The law should be permitted to evolve in response to these developments.

gives full effect to the policies underlying ERISA, the Internal Revenue Code and the Bankruptcy Code. The basic policy of ERISA is to ensure that employees and their dependents and beneficiaries will not be deprived of anticipated retirement benefits. Connally v. Pension Benefit Guar. Corp., 475 U.S. 211, 214 (1986). This is effectuated through the anti-alienation and anti-assignment provisions of ERISA. 29 U.S.C. § 1056(d)(1). This Court has observed, "Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them." Guidry v. Sheet Metal Workers Nat'l Pension Fund, 110 S. Ct. 680, 687 (1990). Accordingly, this Court has recognized that, absent some exception to the general statutory bar of Section 206(d)(1), pension benefits are not subject to nonbankruptcy creditor remedies such as attachment, garnishment, levy, execution or other legal or equitable process. Guidry, 110 S. Ct. at 685. See also this Court's dictum in Mackey v. Lanier Collections Agency & Serv., Inc., 486 U.S. 825 (1988). Similarly, an important policy of the bankruptcy laws is to provide the honest Chapter 7 debtor with a "fresh start." Grogan v. Garner, 111 S. Ct. 654, 659 (1991). Taking planned retirement income effectively removes the underpinings for a realistic fresh start from an employee who incurs substantial unplanned expenses (such as those caused by a catastrophic illness or injury) late in life which, for lack of ability to pay, necessitates the filing of bankruptcy. Likewise, the tax laws implement ERISA labor policy by providing favorable tax treatment only to qualified plans that contain anti-assignment and anti-alienation provisions. 26 U.S.C. § 401(a)(13); Treas. Reg. § 1.403(a)-13(b)(1). If turnover of pension benefits to a trustee is required, an entire employer sponsored pension plan may be subject to disqualification and loss of tax exempt status to the detriment of the sponsor and other employees. In re Moore, 907 F.2d at 1480-81.

In addition to the foregoing, the Sixth Circuit's decision discourages the filing of involuntary bankruptcy petitions as a means of circumventing ERISA's spendthrift provision. 29 U.S.C. § 1056(d)(1); In re Majul, 119 B.R. 118 (Bankr. W.D. Tex. 1990).

This Court has consistently held that statutory interpretation begins with the language of the statute itself. Pennsylvania Dep't of Pub. Welfare v. Davenport, 110 S. Ct. 2126 (1990). "In this case it is also where the inquiry should end, for where, as here, the statute's

language is plain 'the sole function of the courts is to enforce it according to its terms.'" Ron Pair Enters., 489 U.S. at 241 (citation omitted).

II. THE QUESTION PRESENTED IS PREMATURE FOR DECISION

As set forth above, the circuit court decisions applying Section 541(c)(2) have reached a result consistent with pre-Bankruptcy Code law which distinguished between self-settled and employer sponsored plans. Although this distinction may be inappropriate under the plain language of the statute and all ERISA pension plans containing anti-alienation provisions should be excluded from the bankruptcy estate, the law is evolving in that direction. The courts that have concluded that benefits under self-settled plans are property of the estate uniformly addressed ERISA as it existed (i) prior to the 1984 amendments and (ii) prior to the supplement to the legislative history referenced above which acknowledged that the ERISA anti-alienation prohibitions constitute "spendthrift provisions." The 1984 legislative history reads as follows:

> Generally, under present law, benefits under a pension, profit-sharing or stock bonus plan (pension plan) are subject to prohibitions against assignment or alienation (spendthrift provisions) . . . .
>
> Several cases have arisen in which courts have been required to determine whether the ERISA preemption and spendthrift provisions apply to family support obligations . . . .
>
> . . . . The committee believes that the spendthrift rules should be clarified by creating a limited exception that permits benefits under a pension, etc. plan to be divided under certain circumstances.

S. Rep. No. 575, 98th Cong., 2d Sess. 18-19, reprinted in 1984 U.S. Code Cong. & Admin. News 2564-65. Also, the prior circuit court decisions did not have the benefit of this Court's recent rulings in